UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 04-93-P-S***
	)	
LAWRENCE MAHER,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

Lawrence Maher, charged with possessing with intent to distribute a mixture or substance containing cocaine, in violation of 21 U.S.C. § 841(a)(1), seeks to suppress all evidence gathered and statements made as a result of his arrest on July 22, 2004 by Corporal Gerard Hamilton of the Old Orchard Beach, Maine police department. Indictment (Docket No. 9); Motion to Suppress Evidence, etc. ("Motion") (Docket No. 14) at 1. An evidentiary hearing was held before me on October 25, 2004. The government called three witnesses. Neither the government nor the defendant offered any exhibits. The defendant did not call any witnesses. Based on the evidence adduced at the hearing, I recommend that the following findings of fact be adopted and that the motion to suppress be denied.

I. Proposed Findings of Fact

On July 20, 2004 Ernest MacVane, a Windham police officer assigned to a task force of the United States Drug Enforcement Administration ("DEA"), arrested William Johnson at the West Gate Shopping Center in Portland, Maine on a charge of possession of or trafficking in cocaine. After Johnson was processed at the DEA office in Portland and advised of his rights, he agreed to talk with the DEA agents

and to cooperate in their investigation. Johnson told MacVane that he had sold cocaine to a customer at the shopping center and that he had obtained the cocaine from Lawrence Maher, the defendant in this case. Johnson told MacVane that the defendant lived in Massachusetts and that Johnson had purchased cocaine from him twice in the past month. One of these purchases took place at the dog-racing track in Seabrook, New Hampshire, where the defendant put a gun to the ribs of Johnson's customer, who had accompanied him, and told her that he would shoot her if she "ratted on" him. Johnson also said that the defendant had served time with him and was a large trafficker in cocaine throughout southern Maine. He gave the agents the defendant's telephone number; the agents verified that it was the defendant's number by calling the number and reaching the defendant and later by checking cell phone registration records.

Johnson agreed to assist the agents in a staged drug transaction with the defendant. Johnson was told that his telephone calls with the defendant would be monitored and recorded. During the evening of July 20, Johnson called the defendant in an attempt to arrange a delivery of cocaine in Maine. The defendant agreed to sell Johnson four ounces of cocaine but said that he could not then come to Maine because he was working on his Jeep. He told Johnson that Johnson could come to Massachusetts to pick up the cocaine. The agents decided that it was not feasible for them to go to Massachusetts that night, so in a second telephone call Johnson told the defendant that he could not go to Massachusetts and asked if the defendant would like to "do it like before," meaning a sale at the race track. According to the defendant, this was not feasible. Johnson asked for a discount if he bought five ounces and the defendant responded that he might do something if Johnson came to him. The defendant also said that he could bring the cocaine to Maine and meet Johnson between 4 and 6 p.m. the next day. The defendant said to Johnson, "I got you down for four either way."

MacVane then gave Johnson his tape recorder and earpiece so that Johnson could record any further conversations he might have with the defendant that night. The next morning Johnson returned these items to MacVane along with a tape recording of a conversation with the defendant. Johnson made two or three more calls to the defendant on July 21 to find out where the defendant was and when he was going to meet Johnson. They talked about meeting at 9 or 9:30 p.m. the next day; the defendant mentioned getting a cabin in Old Orchard Beach. They did not meet on July 21 because the defendant was having trouble finding a place to stay and it was getting late.

On July 22, 2004 DEA agent Kate Barnard became involved in the investigation. Using the name Sue, she contacted the defendant and told him that she wanted to "hook up." When the defendant asked if she was Sue Conley [phonetic], Barnard replied in the affirmative. Barnard and the defendant agreed to meet at Radley's Market in Old Orchard Beach about one-half hour after their telephone conversation. Johnson also called the defendant to discuss meeting in Old Orchard Beach to carry out his purchase. The defendant told Johnson that he was waiting for a friend at a store and would call Johnson later to arrange a meeting.

Johnson was parked behind the Old Orchard Beach town office with MacVane at this time. DEA agents Paul Wolf and Paul Buchanan were in the area of Radley's Market. MacVane had relayed the substance of the July 22 conversations to Wolf, who had been present during Johnson's conversations with the defendant on July 20 and 21.

Shortly before noon Buchanan was conducting surveillance in the parking area at Radley's Market. He saw the defendant wandering and stumbling in the middle of the parking lot, calling the name "Sue." He recognized the defendant from a previous booking photograph, and Wolf told him that this was the defendant. Buchanan then saw the defendant go into Radley's Market; when he emerged a couple of

minutes later, the defendant appeared to Buchanan to be intoxicated. The defendant was stumbling and looked disoriented. He got into the driver's seat of a white minivan with Massachusetts license plates. After about ten minutes Buchanan approached the minivan and observed the defendant asleep or unconscious, slumped to his right in the driver's seat. No one else was in the van; the keys were in the ignition but the engine was not running. Buchanan looked through the window for weapons but did not see any. He related his observations to Wolf.

Hamilton met with Wolf around 11 a.m. on July 22, 3004; Wolf told him that the defendant was in Old Orchard Beach selling drugs, that the DEA agents were anticipating a transaction later that day and that the defendant was expected to meet an agent using the name "Sue" at Radley's Market. Hamilton waited behind the Old Orchard Beach town hall, which was about 1/10 of a mile from Radley's Market, to see whether the agents needed the assistance of a uniformed officer. Wolf asked Hamilton to meet him at the condos across the street from Radley's Market. When Hamilton arrived there, Wolf told him that the defendant was at Radley's Market, stumbling around, calling for "Sue" and walking in and out of stores and that the defendant had entered a vehicle and was slumped over the steering wheel, appearing to have passed out.

Hamilton then went over to Radley's Market, pulling up behind the van. He walked up to the window on the passenger's side of the van and saw that only the defendant was in the van, sitting in the driver's seat with his head over the steering wheel and his left hand inside his shirt. The keys were in the ignition and the engine was off. Hamilton then walked over to the open window on the driver's side and tried to awaken the defendant by speaking to him. When this was unsuccessful, Hamilton roused the defendant by reaching in and shaking him. Hamilton observed that the defendant had droopy eyes and spoke in a mumble, but was not slurring his words. Hamilton asked the defendant if he was okay and the

defendant responded that he was just leaving. Hamilton could see an open beer can in the van's console and a six-pack of beer on the passenger seat. He asked the defendant if he had had anything to drink or used any drugs before coming there. The defendant replied that he had only had about two ounces of beer and that he did not use drugs; he was there to meet a friend who did not show up. Hamilton then told the defendant that he should not have driven there; the defendant replied that Hamilton was right and asked Hamilton to "cut him a break." He said that he would find a way back to his friend's house in Old Orchard Beach. Hamilton believed that the defendant had been driving, based on his statement, and felt the need to conduct field sobriety tests to determine whether the defendant had been under the influence of alcohol or drugs while he had been driving. He asked the defendant to step out of the van and conducted three field sobriety tests. The defendant did not complete any of these tests successfully.

Hamilton concluded that the defendant was too impaired to be driving and arrested him. After he told the defendant that he was under arrest, the defendant asked Hamilton to give him a break and let him go to his friend's place. After he handcuffed the defendant, Hamilton removed a large sum of currency that was obviously rolled up in the defendant's shirt pocket. There was also a film canister in this pocket which contained a small amount of a brown substance which was later found to be heroin. Hamilton also began an inventory search of the van and found the open beer can, which was three-quarters full; the six-pack; and a black canvas bag behind the passenger seat which contained toiletries and a plastic supermarket bag which in turn contained three sandwich bags, each of which contained a white substance that appeared to be cocaine. Detective Hemingway of the Old Orchard Beach police department completed the inventory search.

The district attorney did not prosecute the defendant on the operating-under-the-influence charge on which Hamilton arrested him because the defendant later was arrested on the more serious charge at issue

here. Hamilton would have arrested the defendant on this charge under the circumstances even if the DEA agents had not been involved.

II. Discussion

The defendant contends that his arrest by Hamilton was illegal and that the field sobriety tests constituted an illegal search, both apparently because probable cause was lacking. Motion at [1], [2], [3]-[4]. The government responds that the field sobriety tests were merely an investigatory detention, not subject to the legal requirement of probable cause; that Hamilton had probable cause to arrest the defendant for operating under the influence ("OUI") or attempted OUI under Maine law; and that, in the alternative, the officers involved had probable cause to arrest the defendant for possession of cocaine with intent to distribute it. Government's Objection to Defendant's Motion to Suppress Evidence, etc. ("Objection") (Docket No. 17) at 5-13. The defendant challenges the searches of his person and his vehicle which followed his arrest only as "follow[ing] in the string of illegalities which began with the initial illegal search during the sobriety tests." Motion at [3]. Accordingly, his motion to suppress that evidence fails if his attack on the field sobriety tests and the arrest fails.

Under Maine law, "[a] person commits OUI if that person . . . [o]perates a motor vehicle . . . [w]hile under the influence of intoxicants." 29-A M.R.S.A. § 2411(1-A)(A)(1). This is a Class D crime. *Id*. § 2411(5). For purposes of this statute, the term "operates" includes attempting to operate. 29-A M.R.S.A. § 2401(6). See also 17-A M.R.S.A. § 152(1)(E) (criminal attempt defined as conduct that constitutes substantial step toward commission of a Class D crime).

With respect to the field sobriety tests, Maine law provides that brief detentions based upon reasonable and articulable safety concerns or suspicion that the defendant has committed a traffic infraction or upon reasonable and articulable suspicion that the defendant has committed a crime are reasonable and therefore do not violate constitutional protections. *State v. Gulick*, 759 A.2d 1085, 1088 (Me. 2000). An officer who begins a conversation with a defendant on the basis of an articulable suspicion "may undertake a detention of the citizen that is reasonably related in scope to the concerns that justified the original contact." *Id*. at 1089 n.7. "[I]t is well established that a field sobriety test, like any other investigatory stop, must be based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *State v. Wood*, 662 A.2d 919, 920 (Me. 1995) (citation and internal quotation marks omitted). *See also State v. Little*, 468 A.2d 615, 617 (Me. 1983) (request to perform field sobriety tests does not constitute arrest).

> Because of the significant public interest in preventing a motorist whom an officer reasonably believes may be intoxicated from continuing to drive, and because further detention for a field sobriety test is a minimal intrusion on an already legally stopped individual's privacy, . . . many state courts have held that an officer may detain a motorist for such testing so long as there is reasonable suspicion that the driver may be intoxicated.

Rogala v. District of Columbia, 161 F.3d 44, 52 (D.C. Cir. 1998) (listing cases). Here, Hamilton had been told that the defendant had just been seen stumbling around the parking lot of Radley's Market — clearly not the defendant's residence — while calling for "Sue," entering a parked vehicle with which he was associated and which bore Massachusetts license plates and slumping over its steering wheel, apparently unconscious. He himself observed that the defendant was the only occupant of the vehicle, that he was seated in the driver's seat with his head over the steering wheel, that an open can of beer was beside the defendant, that the keys were in the vehicle's ignition and that the defendant did not respond to verbal

attempts to arouse him. In addition, when aroused the defendant both admitted that he had driven the vehicle to the parking lot and stated that he was "just leaving." This was sufficient evidence, together with the rational inference that the defendant had entered the vehicle in order to drive it, to justify Hamilton's request that the defendant perform the field sobriety tests. *See, e.g., Rogala*, 161 F.3d at 52 (glossy eyes, bloated face and running red light sufficient); *Wood*, 662 A.2d at 921 (bloodshot eyes, slurred speech, failure to comply with request to blow in officer's face). The field sobriety tests did not amount to an illegal search under the circumstances of this case.

With respect to the arrest of the defendant for OUI, he points out correctly that none of the officers involved apparently saw him operate his vehicle in an erratic manner. Motion at [3]. That does not mean that the arrest lacked probable cause, however. The defendant's failure of each of the three field sobriety tests provides probable cause, particularly when coupled with the defendant's admission that he had recently been driving[1] and his statement to Hamilton, while seated in the driver's seat, that he was "just leaving" the parking lot. A reasonable officer in Hamilton's position could have believed that the defendant had committed the crime of OUI when he drove to the parking lot[2] and that he intended to commit, or attempt to commit, the same crime in the very near future. *See United States v. Link*, 238 F.3d 106, 109 (1st Cir. 2001) (probable cause exists if at time of arrest collective knowledge of officers involved warranted prudent person in believing that defendant had committed an offense); *see also State v. Burgess*, 776 A.2d 1223, 1226, 1228-29 (Me. 2001) (upholding OUI conviction where officer did not see

[1] *See* 29-A M.R.S.A. § 2431(4) (statement by defendant that he was operator of a vehicle may constitute sufficient proof that the vehicle was operated by the defendant); *State v. Deschenes*, 780 A.2d 295, 298 (Me. 2001) (same).

[2] Agent Barnard, posing as "Sue," had called the defendant in the late morning and arranged to meet him at Radley's Market one-half hour later. Hamilton was first briefed on the situation around 11 a.m. that day and approached the defendant soon thereafter. It is reasonable under the circumstances to infer that the defendant drove to the parking lot shortly before the officers observed him there.

defendant operate vehicle on public way but defendant responded "I am seated here, aren't I" while seated in driver's seat after being asked whether he had driven to present location).

Because Hamilton had probable cause to arrest the defendant for OUI, there is no need to discuss the government's alternative argument. Similarly, because the defendant's argument for suppression of the fruits of the search following his arrest and any statements that he may have made following the arrest is based solely on the alleged illegality of the field sobriety tests and the arrest, that argument fails as well. *See, e.g., United States v. Meade*, 110 F.3d 190, 196, 199 (1st Cir. 1997) (upholding seizure of gun found in defendant's pocket during search incident to arrest); *United States v. Zapata*, 18 F.3d 971, 979 (1st Cir. 1994) (post-arrest confession admissible where only basis offered for its suppression — alleged illegality of stop, search and arrest — rejected by court); *United States v. Jorge*, 865 F.2d 6, 9-10 (1st Cir. 1989) (upholding search of bag found in area of vehicle within defendant's immediate control).

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to suppress be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 27th day of October 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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